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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

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**No. 77-1696**

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NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY  
AND TENNECO INC., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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**REPLY BRIEF FOR PETITIONERS**

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Pursuant to Rule 24 of the Rules of this Court, petitioners submit this Reply to the Brief for the United States in Opposition.

**UNITED STATES' FACTUAL PRESENTATION**

The Brief for the United States in Opposition makes unsubstantiated<sup>1</sup> assertions which are inaccurate, in-

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<sup>1</sup> The Brief for the United States contains no record references. Petitioners documented all statements in their Petition by references to the record below. Although counsel for both the United States and the petitioners asked that the record below be transmitted to this Court in connection with this Petition for Writ of

complete, and misleading, thus obscuring the issues presented to this Court for review.

The United States asserts (U.S. Br. 2): "In August 1974 Newport News notified the Navy that it regarded the option to be void because, it asserted, the Navy had failed to negotiate in good faith." In fact, when Newport News gave this notification, the Navy's failure to negotiate in good faith as required by the terms of Contract Modification P00018 was only *one* of many reasons advanced at that time for invalidity of the option. The affidavit of F. Hunter Creech filed in the District Court on August 29, 1975, briefly explains, at pages 3-9, the events leading to Newport News' August 1974 notification to Navy that the option was void. The impression left by the United States in its Brief is that the only issue that has separated the parties since 1974 on the question of option validity is the failure of good faith negotiations, when in fact other substantive legal questions as to the validity of the option have always been present and have been known by the Navy. The significance of this background to this case is that the District Court had reason to believe, and did believe, as early as August 29, 1975, that the commitment the parties made to the court on that date to "negotiate in good faith" embraced *all issues* dividing the parties, including, but not limited to, the validity of the option and its exercise. This commitment of the parties, and the District Court's under-

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Certiorari, the clerks of the Court of Appeals and this Court advised that such transmittal was unnecessary. In view of the questions now presented concerning the completeness of the information before this Court, petitioners suggest that it might be appropriate for this Court to call up the record for use in its consideration of the Petition.

standing thereof, is material to this case since it provided (1) the framework for the actions of both parties throughout this case including the action that led to the agreement between Gordon Rule and Newport News, and (2) the basis of the District Court's finding that the United States had acted less than fairly and candidly toward Newport News and the District Court.

Also, the assertion in the Brief of the United States (U.S. Br. 3) that Gordon Rule "was informed several times during the negotiations that he did not have contracting authority" is misleading. On August 20, Mr. Rule possessed a formal, duly issued, contracting officer's warrant, a fact conceded by the United States. It was only after the agreement between the parties was reached on August 20, that certain statements were made by Mr. Rule's superiors to Mr. Rule and to Newport News' representatives alleging that review and approval of Mr. Rule's agreement with Newport News Shipbuilding were necessary to finalize it. In addressing the issue of Mr. Rule's authority it is not enough to state that Mr. Rule was informed that he lacked contracting authority. The central issue, ignored by the Court of Appeals and the Brief for the United States in Opposition, is the legal efficacy of these attempts to limit Mr. Rule's authority, which attempts were made *after* Mr. Rule's appointment and *after* he had reached agreement with Newport News.<sup>2</sup>

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<sup>2</sup> At no time prior to August 20 was Newport News told of any limitations on Rule's authority. [App. 239-41] Moreover, Mr. Rule testified that he was not told of any limitation on his authority prior to the agreement of August 20. [App. 306, 374] Furthermore, Mr. Rule's contracting officer's warrant (on DD Form 1539) issued on August 19, 1976, appointed him a "Contracting Officer"



In addition, the statement in the Brief for the United States (U.S. Br. 6) that Mr. Rule did not sign certain draft modifications submitted to him by Newport News "because they contained substantive provisions about which there remained disagreement" is again misleading. It creates the impression that bargaining was continuing after August 20 and that the minds of the parties had not met on that date. In fact, it is undisputed by Mr. Rule and Mr. Dart (the parties' representatives) that the written drafts were prepared to confirm the agreement that had already been reached and to quantify what the parties had done. [App. 235, 307.]

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and granted him "Unlimited authority with respect to negotiations with Newport News Shipbuilding and Dry Dock Company for construction of CGN 41 under Contract N00024-70-C-0252." [App. Ex. 276; App. 230, 301, 306-07, 361, 374-75].

The Armed Services Procurement Regulation (ASPR), § 1-201.3, 32 C.F.R., Parts 1-39 (1976), defines a "Contracting Officer" as follows: "*Contracting Officer* means any person who, either by virtue of his position or by appointment in accordance with procedures prescribed by this Regulation, is currently a contracting officer (See 1-400) with the authority to enter into and administer contracts and make determinations and findings with respect thereto, or with any part of such authority." (emphasis added)

ASPR, § 1-405.2, 32 C.F.R., Parts 1-39 (1976), provides that contracting officers are to be appointed by DD Form 1539 and that any limitations on the scope of authority to be exercised by the contracting officer, other than those contained in ASPR, shall be entered on the face of the certificate of appointment. It is clear that no limitations were entered on the face of Mr. Rule's warrant. [App. Ex. 276] Moreover, ASPR § 1-405.4, 32 C.F.R., Parts 1-39 (1976), provides that, "to accomplish a modification of the contracting officer's authority, his present appointment shall be revoked, and a new certificate issued." It is undisputed that Mr. Rule's warrant was not revoked until October 8, 1976, after he reached agreement with Newport News on August 20 and after he executed the formal contract confirming that agreement. [App. 333, 334, 572-73; App. Ex. 279]

That the parties discussed the terms of their agreement after August 20 does not mean that bargaining was continuing; the parties were merely seeking the correct words to record their previously concluded agreement. *See, Saul Bass & Associates v. United States*, 505 F.2d 1386 (Ct. Cl. 1974).

#### AUTHORITY OF THE ATTORNEY GENERAL

Equally significant is the Government's cavalier dismissal (U.S. Br. 6) of the issue presented to this Court concerning the lack of authority in the Attorney General to set aside a contractual action of an agency of the United States simply because that action has the effect of mooted pending litigation in which the Attorney General has appeared as counsel. In spite of the United States' attempt to brush this issue aside, it is clear that the Court of Appeals itself not only addressed the issue, but also considered it in part dispositive: "We vacate this order because we conclude that the parties' negotiators did not settle the case orally and because the Attorney General, whose approval was essential, rejected the terms that were ultimately reduced to writing." (Pet. Add. 2a, emphasis added.) Moreover, the Court of Appeals devoted an entire section of its opinion to its view of the Attorney General's authority. (Pet. Add. 7a-9a).

#### STANDARD OF REVIEW

Finally, there is no support for the virtually frivolous contention advanced by the United States (U.S. Br. 8-9) that the clearly erroneous standard of review of Rule 52(a) Fed. R. Civ. P. does not apply. The United States argues that petitioners' motion in the District Court, "although not expressly so termed, was

clearly a motion for summary judgment under Rule 56." Petitioners' motion was, however, not a motion for summary judgment; it was instead based (i) on the District Court's inherent power to enter judgment, under Rule 58, Fed. R. Civ. P., enforcing a settlement agreement and (ii) on the District Court's power as set forth in Rule 41(b), Fed. R. Civ. P., to dismiss the case for the failure of the United States to comply with an order of court.

As the record in this case demonstrates, the United States contended in its brief to the Court of Appeals that petitioners' motion was one for summary judgment and that the District Court committed an error by resolving factual inferences in favor of petitioners and against the United States. In the alternative, the United States asked the Court of Appeals to find that the District Court had committed error in its failure to hold an evidentiary hearing on petitioners' motion. It is significant that the United States neither (i) asked the District Court to hold an evidentiary hearing in order to resolve factual disputes, nor (ii) suggested to the District Court that it was precluded on the state of the record from resolving any conflicting evidence as to whether there was a binding compromise agreement between the parties and whether the United States had failed to negotiate in good faith. To the contrary, in the District Court, the United States filed, and relied on, numerous affidavits and the transcript of the deposition of Gordon W. Rule in support of its positions that no settlement agreement had been concluded and that the United States had not failed to negotiate in good faith.

The Court of Appeals held that no error had been committed by the failure of the District Court to hold

an evidentiary hearing, recognizing the well settled principle that a court has inherent power to enforce summarily a compromise terminating pending litigation. While some courts have held that, in the case of a dispute about the existence of a settlement agreement in which complex factual issues are presented, an evidentiary hearing should be held, *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1969), it is beyond dispute that, either after a summary proceeding or after an evidentiary hearing, the district court must, or at the very least *may*, make findings in order to rule on a motion to enforce a settlement. There is thus no basis whatever for, and no case can be found to support, the proposition advanced by the United States that a motion to enforce a settlement is akin to a motion for summary judgment where all facts must be viewed most favorably to the party opposing such motion. Since a district court can make findings on a motion to enforce a settlement agreement, and in this case did make findings, the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P. must apply to any review of those findings.<sup>3</sup>

The alternative basis of petitioners' motion in the District Court, and the alternative basis of that court's decision in this case, was that the complaint of the United States should be dismissed on account of the failure of the United States to comply with orders of court directing good faith negotiations between the parties. In such a case, the District Court has inherent power to impose sanctions, including dismissal, for the failure of a plaintiff to comply with an order of

<sup>3</sup> A more complete discussion of the relevant facts and applicable law may be found in the Petition for Writ of Certiorari, 21-28, and in petitioners' Brief to the Court of Appeals, 7-10.

court. *Reid v. Prentice-Hall, Inc.*, 261 F.2d 700, 701 (6th Cir. 1958). Where the decision of the court to impose such a sanction is based on its findings of certain facts, those findings should not be overturned unless shown to be clearly erroneous. *Id.* No such showing has been made in this case, and the Court of Appeals reached its erroneous conclusions only by acting in contravention of the standard of review required by Rule 52(a), Fed. R. Civ. P.

#### CONCLUSION

For all of the reasons set forth in the Petition and in this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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